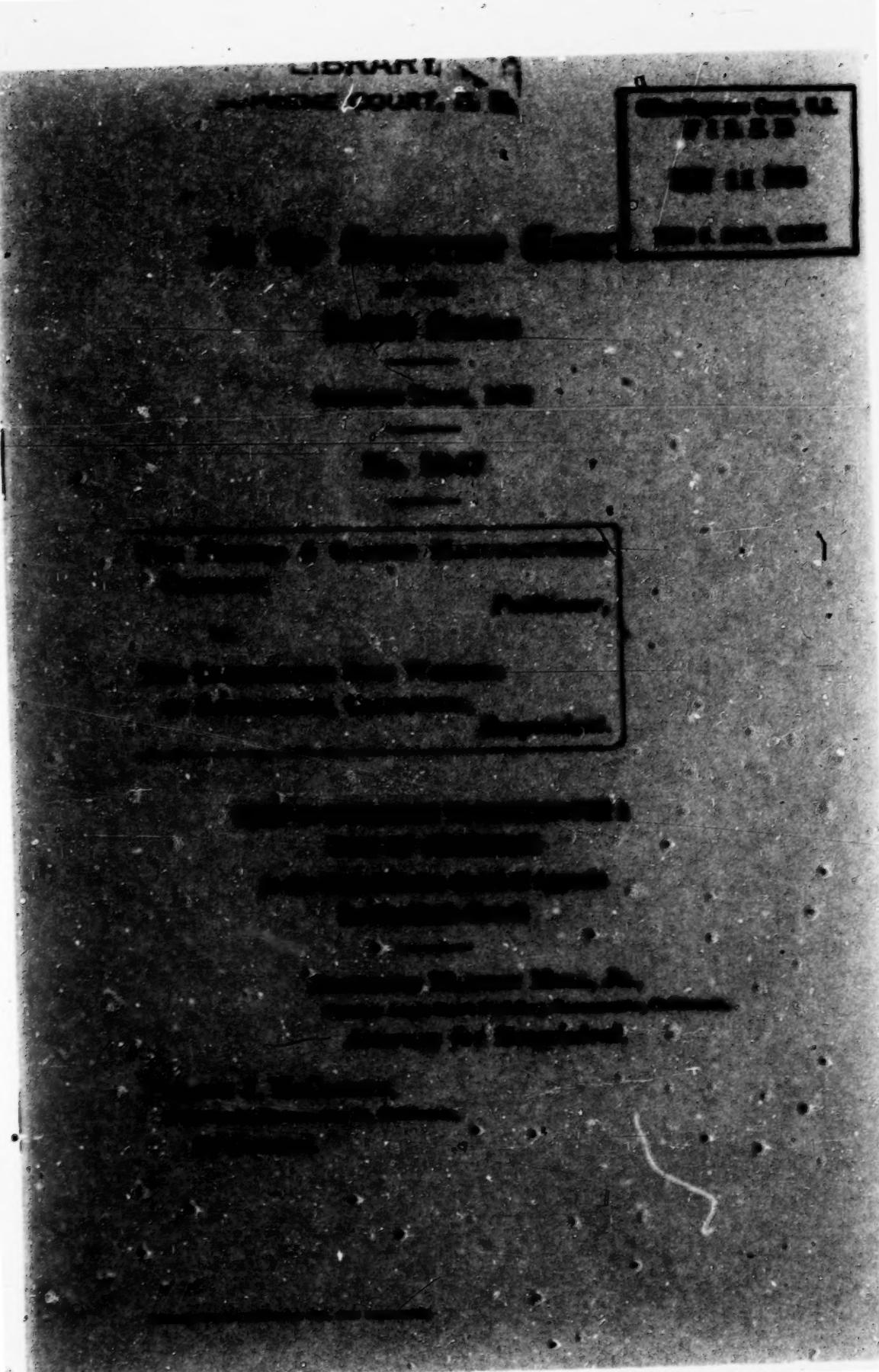

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 1047

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Petitioner,

vs.

THE INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Respondent prays for denial of a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered herein on February 15, 1963.

STATEMENT OF THE CASE

The arbitration provision in question, in its entirety, reads:

> "Step 4: A grievance not adjusted by these steps may be taken to a Board of Arbitration by either party within 60 days of the initial presentation. In this event, the Company and the Union shall each select an arbitrator within 15 days after such request. The two they name shall pick a third. If they cannot agree on the third arbitrator within 10 days, they shall ask for lists of arbitrators from the American Arbitration Association from which they may select and agree on the third arbitrator.
>
> It is understood that arbitration will be limited to grievance involving the interpretation or application of the provisions of this Agreement. The Company and the Union will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this Agreement in making this decision.
>
> The majority decision of any 2 of the 3 arbitrators shall be final and binding on both Company and Union."

The trial court found and held that the parties by the arbitration provision and the bargaining history intended that either party could unilaterally refuse to jointly stipulate any grievance without regard to whether a grievance did, or did not, involve interpretation or application of the provisions of the agreement. The trial Court did not decide nor determine whether the Norman Raiser grievance involves a prob-

lem of interpretation or application of the provisions of the agreement. The trial court found it unnecessary to reach such question.

Thus, by the holding of the trial court, neither party under the arbitration provisions is bound to arbitrate anything.

The trial court did not apply the proper test to the evidence. By the evidence, the trial court, in denying Union's request for order to arbitrate, could not have said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; and, particularly, when doubts should be resolved in favor of coverage.

As the Court of Appeals held:

> "If it was the intention of the parties by the language used in Step 4 that either party could unilaterally evade the arbitration provisions by refusing to stipulate the grievance, we are unable to perceive the intention of the parties in restricting arbitration to grievances involving the interpretation or application of the provisions of the agreement."

Accordingly, the Court of Appeals set aside the order of the District Court denying Union's petition to compel arbitration and remanded to determine whether the "Raiser" grievance involves the interpretation or application of the provisions of the agreement.

QUESTION NO. 1

Petitioner seeks to make an incomplete quotation from *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 580, into a postulate which petitioner frames, asserting that the case at hand involves an important and unresolved aspect of such postulate. The full paragraph from *United Steelworkers v. Warrior & Gulf Navigation Co.*, supra (1960), is the following:

> "The Congress, however, has by Sec. 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Sec. 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. *An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.*" (Emphasis supplied.)

Petitioner cites *Teamsters v. Yellow Transit Freight Lines, Inc.*, 370 U.S. 711 as being a similar contractual

situation. As taken from the report, the following is the pertinent contract provision in that case:

> "(d) Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Committee determines to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse."

Petitioner cites *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, as supporting authority for petitioner. The question involved whether the employer was bound to arbitrate its claim for damages against the union for breach of an undertaking not to strike. The arbitration article in question in that case "precludes arbitration boards from considering any matters other than employee grievances."

Petitioner cites *United Electrical, Radio & Machine Workers v. General Electric Co.*, 208 F. Supp. 870 (S.D.N.Y. 1962), as further supporting authority for petitioner. The language of the arbitration provisions in that case bespoke ". . . if the parties agree to arbitrate . . .". The holding of the case is authority for the proposition, namely: "The law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation."

QUESTION NO. 2

Petitioner has failed to fairly quote from the bargaining history in evidence all that which the Court of Appeals considered.

It seems self-evident that Union did not intentionally bargain away (unconditionally) its right to strike to obtain an arbitration clause the Company can unilaterally evade at will in each and every instance.

If the parties understood that either could unilaterally evade the arbitration provisions of the Agreement at will (as the trial Court finds), what then was the significance of their understanding limiting arbitration to grievance involving the interpretation or application of the Agreement?

The following excerpts are extracted from the certified record *to emphasize that the bargaining parties intended that limiting arbitration to grievance involving the interpretation or application of the Agreement should signify something meaningful, particularly that such restriction was intended to mitigate against an understanding that either party could unilaterally evade the arbitration provisions of the Agreement at will in any case by the simple device of refusing to stipulate the grievance jointly in writing.*

Each and all of the following quotations are statements made *by Company representatives* at the negotiations:

"Mr. Mellinger. This isn't in here for the purpose of blocking arbitration at all. This is simply

in here so that together we define what the problem to take to the arbitrator is. As long as that problem has to do with the specific conditions set up in the contract, we simply follow the contract and agree to stipulate it jointly and then take it on to arbitration." (R.III:202:3-9.)

"Mr. Mellinger. That is not it at all. This is simply in there so when we go to arbitration that we together define what the problem is for the arbitrator.

The provision says that, 'The Company and the Union will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this agreement in making this decision.'

That is just what I have been saying, we are willing to arbitrate things according to the arbitration clause here but we are not willing to broaden it." (R.III:207:17 to 208:1.)

"Mr. Mellinger. All this does is say we must stipulate together what the problem is." (R.III: 209:16-17.)

"Mr. Mellinger. You are welcome to your opinion but what I am saying this thing does is simply say we will stipulate what the problem is together." (R. III:209:24-26.)

"Mr. Mellinger. That is the way you feel about it because you say you do and I believe what you say but this thing simply says that the Company and the Union will stipulate the grievance jointly in writing." (R.III:212:19-22.)

"R" references are to the volume, page and where necessary the line of the certified record.

"Mr. Mellinger. Well, it has not been used that way by either the Union or the Company." (R.III:213:7-8.)

"Mr. Mellinger. Burl, I thought you certainly expressed your viewpoint very nicely there. Arbitration in any contract is a matter of the Union and Management agreeing that there are certain things that we are willing to give to a board of arbitration to arbitrate when we can't agree on it.

Now, we set up our clause, that means the Union and Management set up the clause that we have in our contract, we agreed that it should be restricted to the interpretation of the articles of the agreement. Whatever the things that we differ on strictly have to do with them, then the Company is not going to use this joint stipulation in any way to block the arbitration.

The purpose of this joint stipulation is so what we go to the arbitrator to arbitrate on is mutually agreed as the grievance but if what we think is the grievance is not an interpretation of an agreement in the contract then by the very first part of that paragraph it is not arbitrable and this is the thing that will restrict arbitration and not the joint stipulation.

Now, I am not willing from anything I have heard to agree to broaden the area of the arbitration beyond the interpretation of the agreements in the contract and I don't think you would, for your own protection, to do that, so that all I can do is assure you that the requirement that the arbitration deal with the interpretation of the aricles of the contract is the thing that is vital, this is the thing we define as one of two stipulations and if it does and we can agree

on the grievance then there should be no problem in that and we will never use this joint stipulation as a block to your taking something to arbitration.

In fact, we have been very helpful in getting the proper things into the joint stipulation in the cases where we have asked to arbitrate an interpretation of the contract.

I really don't think for your protection and for ours that we want to broaden the area of arbitration." (R.III:216:26 to 218:8.)

"Mr. Mellinger. *Well, I have tried to give you all the assurances that I can that this is not in there for the purpose of blocking arbitration and as long as the grievance deals with the interpretation of the contract they we have never and don't intend to use this joint stipulation to block it.*" (Emphasis added.) (R.III:221:17-22.)

"Mr. Mellinger. *You are saying it deals with the interpretation or application of the provisions of this agreement and if it does we never have and don't intend to use the joint stipulation as a block to your taking it to arbitration.*" (Emphasis added.) (R. III:222:12-15.)

"Mr. Mellinger. *We never have and don't intend to. The only time this thing is restrictive is when it doesn't deal with the interpretation and application of the agreement and that is the very first sentence in that paragraph and the second sentence is about jointly stipulating.*" (Emphasis added.) (R.III:222:18-22.)

"Mr. Mellinger. The thing that both these examples deal with is the first sentence which says, 'It is understood that arbitration will be

limited to grievances involving interpretation or application of the provisions of this agreement.' None of them have to do with the joint stipulation." (R.III:225:7-11.)

"Mr. Mellinger. *We are willing to entertain a proposal on your part to take it out but I don't agree with what you are saying because the only reason you can't take it to arbitration is that it doesn't deal with the interpretation or application of the provisions of the contract.*" (Emphasis added.) (R.III:230:4-8.)

"Mr. Mellinger. Bargaining has to do with what we are doing now, bargaining a contract, and I expect you are bargaining in good faith." (R.III:230:23-25.)

"Mr. Mellinger. *Well, the only thing is and I have said this before, we have agreed to arbitrate certain things. We have not agreed to arbitrate anything beyond that and if it falls in that range then we are willing to arbitrate and we have never used the joint stipulation to stop arbitration but if it deals with something outside of this range which I am not agreeing to include in the arbitration clause, then we are not willing to arbitrate. However, the word 'jointly' isn't the reason we are not, the reason we are not is that it doesn't involve the interpretation or application of a provision of the agreement.*" (Emphasis added.) (R. III:231:21.)

"Mr. Mellinger. If you are talking interpretation or application of the contract we have never blocked it." (R.III:234:22-23.)

"Mr. Mellinger. If we are truly talking about an application or interpretation of the contract

then we would never block the arbitration by this joint stipulation.

Now, the only time we are not willing to go to arbitration is when it falls outside the interpretation or application of the contract and it is possible to tie a lot of things into the contract that aren't really a part of it and we are not willing to go out and arbitrate on all those things." (R. III:235:11-18.)

"Mr. Mellinger. You have an arbitration clause, Burl, and in it we agree we will arbitrate the interpretation and application of this agreement and we have never failed to do that." (R. III:245:8-11.)

"Mr. Mellinger. You and I have agreed that we are willing to arbitrate the interpretation and provisions of this contract, right?" (R.III:248: 5-7.)

"Mr. Mellinger. Now, we are not going to violate the contract and a part of the contract says that we are willing to arbitrate the interpretation and application of the agreement and we are not going to violate that no more than we are going to violate anything else." (R.III: 248:14-18.)

"Mr. Mellinger. *Well, we will never use the word 'jointly' to block any arbitration that has to do with the provisions or interpretation or provisions of the contract.*" (Emphasis added.) (R. III:249:1-3.)

"Mr. Mellinger. Because that stipulation there is simply a matter of us getting together and defining the grievance." (R.III:249:7-8.)

"Mr. Mellinger. That is right. If it is actually an interpretation or application of the agreement we will arbitrate." (R.III:249:17-19.)

"Mr. Mellinger. That is for your protection and my protection and it simply says we should get together and define mutually what the grievance is." (R.III:259:5-8.)

"Mr. Mellinger. I don't see what the word 'jointly' has to do with the point you are making now of having something to do with the interpretation or application of a provision of the contract." (R.III:259:16-19.)

"Mr. Melinger. That doesn't have anything to do with stipulating it mutually or jointly." (R. III:259:22-23.)

"Mr. Mellinger. *The stipulation jointly is simply a joint stipulation of what the grievance is*" (Emphasis added.) (R.III:259:26 to 260:1.)

"Mr. Mellinger. That stipulation, in order to be arbitrable, has to be an interpretation of an application or provision of the contract." (R. III:260:3-5.)

"Mr. Mellinger. The fact it is stipulated jointly doesn't make it or not make it an interpretation or application of a provision of the contract." (R.III:260:7-9.)

"Mr. Mellinger. I think it means something, it means if there is a disagreement on one of the provisions or the application of the contract we are willing to go to arbitration with it. That is what it means and that is what we intended it to mean and that is what it will provide.

It does not provide unlimited arbitration in any manner, if that is what your lawyer was

referring to, he is right, but as far as providing arbitration for the application or interpretation of this contract, it does that and it has always done that. The other Unions around the circuit have used it for that and we have never refused that." (R.III:261:4-14.)

"Mr. Mellinger. We have never refused to arbitrate anything that is an interpretation or application of a provision of the contract, but we have agreed to do it and just like the rest of the provisions we aren't about to any more violate this clause than any other clause of the contract." (R.III:261:16-20.)

"Mr. Mellinger. If it has to do with an interpretation or application of a provision of this contract and we cannot agree on it, then we mutually stipulate what the grievance is and we select a board of arbitration to submit it to. The board hears both sides and according to the contract the majority decision of any two of the three arbitrators shall be final and binding on both the Company and the Union." (R. III:262:3-9.)

"Mr. Mellinger. If we mutually agree this is an interpretation or application of the contract then what we do is sit down and mutually stipulate we cannot agree whether or not to pay this man and so forth and then we select a board of arbitrators and it goes to arbitration.

We have never refused to arbitrate anything that is a part of the interpretation or application of the contract, just like we won't violate any other provision of the contract. We just don't fail to abide by the provisions of the contract. It is perfectly possible there will be differences

of opinion of interpretation of this contract and, if there are, and it is truly an intepretation of the contract we are talking about, as our clause calls for, we have never stood in the way of arbitration." (R.III:263:11-24.)

"Mr. Mellinger. All I am trying to say is that I am willing to abide by the contract. The contract calls for arbitration of an interpretation or application of a provision of the contract and I am willing to abide by it. I am always willing to abide by it and I always expect to be, but I am not willing to broaden it." (R.III:264:18-23.)

"Mr. Mellinger. John, if it falls within the interpretation and application of a provision of the contract and we agree it does, then we simply state the problem and take it to arbitration." (R.III:268:11-14.)

"Mr. Mellinger. You have every means of forcing us to live up to the contract, Burl. We have agreed that we will live up to the terms of the contract and by the terms of the contract if there is a disagreement on the interpretation or application of a provision of the contract, that it it will go to arbitration. We have agreed to that and we will abide by it." (R.III:279:12-18.)

"Mr. Mellinger. *No Clarence, we can certainly disagree on the interpretation of some provision of the contract and can mutually stipulate that we disagree on it and send it to arbitration. That isn't anything that is difficult.*" (Emphasis added.) (R.III:280:1-4.)

"Mr. Mellinger. We have agreed contractually to arbitrate any disagreement of any provision or application of the terms of this contract. We

have agreed contractually to do it and we will abide by that contract." (R.III:280:7-10.)

"Mr. Mellinger. Well, let me say, Burl, I am very impressed with what you have suggested here, I think we are very close to a contract.

I would like to look at it in detail and why don't we take a short recess. Even though it is close to our closing time we might be able to come back to you this afternoon." (R.III:283. 2-7.)

Petitioner cites *Soap Workers v. Procter & Gamble Mfg. Co.*, 48 L.R.R.M. 2766 (N.D. Ill. April 29, 1960). The published opinion, while based on stipulated documents and documentary exhibits, does not set forth the same so that determination as to what the bargaining history actually was can be referred to for comparison. It is significant that that decision was rendered prior to *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574. Petitioner has neglected, in this regard, to bring attention to two cases, both decided in 1962, against Petitioner, which mitigate strongly against Petitioner's contentions herein, namely:

Procter & Gamble Ind. Union of Port Ivory v. Procter & Gamble Manufacturing Company, 298 F. 2d 644; and,

Procter & Gamble Ind. Union of Port Ivory v. Procter & Gamble Manufacturing Company, 298 F. 2d 647.

QUESTION NO. 3

Petitioner raises the "clearly erroneous" question under Rule 52(a), Rules of Civil Procedure, and cites *United States v. Gypsum*, 333 U.S. 364. Following is a quote from that decision which seems apt.

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The cause at hand should not be reviewed by the Supreme Court because:

(1) Petitioner has not shown that there is an important question of Federal law which has not been, but should be, settled by this Court;

(2) Petitioner has not shown that the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court;

(3) Petitioner has not shown any unusual departure from judicial proceedings in the courts below as to call for an exercise of this Court's power of supervision.

CONCLUSION

Petitioner having failed to show why the cause should be reviewed by the Supreme Court of the United States, Respondent respectfully requests that the request for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Dated, Sacramento, California,
May 3, 1963.

Respectfully submitted,
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